STATE OF MICHIGAN

COURT OF APPEALS

EDWIN JAKUBS and EDITH JAKUBS,

Plaintiffs-Appellants,

v

BETTEN FAMILY CHEVY OLDS,

Defendant-Appellee.

UNPUBLISHED
November 2, 2001

No. 225823
Van Buren Circuit Court
LC No. 96-041963-CK

Before: Gage, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's February 22, 2000, order dismissing plaintiffs' claim with prejudice and imposing $1,000 in sanctions. We affirm.

This case has a protracted and highly contentious procedural history. Plaintiffs are the owners of property in Van Buren County. Defendant leases a car dealership on property next to plaintiffs'. Plaintiffs filed the instant trespass action in September 1996. The complaint alleged that construction on defendant's land had altered the natural flow of water from defendant's property to plaintiffs' property. As relevant to this appeal, the parties entered into a settlement agreement on the record in open court on February 12, 1998. Following extensive settlement discussions, the parties agreed that a drainage ditch would be dug on defendant's land, and that water runoff would be channeled into the drainage ditch.

The parties agreed that plaintiffs' engineer, Monte Sternaman, would prepare a site plan for the proposed work, and submit it to defendant's engineer, Ronald Kadelsik, for approval. Once Kadelsik approved the plan, plaintiffs were to submit the plan for the approval of the Michigan Department of Transportation (MDOT), and the Van Buren and Cass County District Health Department. Similarly, defendant was to submit the proposed plan to the South Haven Township Planning Commission for its approval. Both parties agreed that the approval of these agencies of the plan was an express condition precedent to the agreement.

In May 1998, defendant moved to compel specific performance of the settlement agreement. During the June 9, 1998, hearing on the motion, defendant's attorney indicated to the trial court that plaintiffs had failed to take any action consistent with the settlement agreement. During the hearing defendant's attorney also reiterated the specifics of the parties' settlement agreement. Plaintiffs did not challenge defendant's recitation of the terms of the agreement.

Defendant's attorney further indicated to the trial court that plaintiffs had discharged their attorney and engineer since the February hearing, and that no action had been taken to comply with the settlement agreement until defendant moved to compel specific performance. Defendant's attorney also explained to the court that although plaintiffs had very recently submitted a site plan to defendant's engineer, it did not comply with the terms of the February 12, 1998, settlement agreement. Defendant's attorney also requested that the court impose $600 in sanctions against plaintiffs for failing to comply with the settlement agreement. In response, plaintiff's attorney argued that the plan set out in the February 12, 1998, settlement agreement would not be approved by the three agencies, and that another plan encompassing new specifications was necessary. Rejecting this argument, the trial court found that plaintiffs had failed to comply with the terms of the settlement agreement and imposed $600 in sanctions.

Following the hearing, in an order entered June 23, 1998, the trial court ordered that Sternaman, plaintiffs' former engineer, be asked to prepare a site plan in accordance with the February 1998 agreement at plaintiffs' expense because he was familiar with the settlement agreement's specific terms. The trial court further ordered that if Sternaman refused to prepare the plan, defendant's engineer, Kadelsik, was to do so at plaintiffs' expense.

Three months later, in an order entered September 29, 1998, the trial court informed the parties that the case would be dismissed for lack of progress unless action was taken in the ensuing twenty-eight days. See MCR 2.502. Although plaintiffs filed an October 14, 1998, motion to remove the case from the no-progress docket, the trial court subsequently entered an order dismissing the case without prejudice on February 22, 1999. After plaintiffs filed objections to the February 22, 1999, order, the trial court conducted a hearing on March 8, 1999.

At the hearing, plaintiffs challenged the terms of the settlement agreement, arguing that it would not be approved by the government agencies. Plaintiffs also argued that the approval of the Department of Environmental Quality of the site plan was also necessary. Following the March 8, 1999, hearing, the trial court entered an order vacating the February 22, 1999, order, once again dismissing plaintiffs' claim without prejudice, and specifying that if application was not made to reopen the case within nine months, the dismissal would operate as a dismissal with prejudice. The trial court also ordered plaintiffs to pay defendant's counsel $1,500 in sanctions.

In October 1999, plaintiffs moved to reopen the case. A hearing on plaintiffs' motion was held on November 12, 1999. During the hearing plaintiffs once again challenged the terms of the settlement agreement, and requested that the trial court vacate the settlement agreement and order a jury trial. According to plaintiffs, the settlement plan should not be followed because it would harm plaintiffs' property. At the conclusion of the hearing, the parties agreed that their respective engineers would meet in an attempt to resolve the deadlock between the parties. The trial court reserved its decision regarding plaintiffs' motion to reopen the case until January 2000.

At a subsequent hearing on January 7, 2000, the trial court once again afforded the parties the opportunity to engage in further settlement discussions before dismissing plaintiffs' claims with prejudice. Specifically, the trial court allowed the parties until January 18, 2000 to reach a settlement agreement that both parties would approve. Another hearing was held before the trial court on February 22, 2000, where plaintiffs' attorney requested that the trial court conduct an evidentiary hearing on the matter. The trial court rejected plaintiffs' argument, and once again

ordered that the parties be given an opportunity to reach a settlement agreement. Because the parties were unable to do so, the trial court entered an order dismissing plaintiffs' claim with prejudice on February 22, 2000, and awarding defendant $1,000 in sanctions. In its order, the trial court stated:

> It is the finding of this Court that a settlement agreement was reached between the parties on February 12, 1998, which settlement was placed on the record in open court. It is the further finding of this Court that since that time Plaintiffs have persistently sought to prevent that settlement from being implemented, and the Court having further determined that the Plaintiffs' refusal to implement the settlement agreement constitutes a breach of that settlement agreement, which breach has prejudiced, and continues to prejudice the rights of the Defendant in this civil action . . .

Plaintiffs now appeal as of right.

I

The thrust of plaintiffs' initial argument on appeal is that the trial court erred in dismissing plaintiffs' claim with prejudice. According to plaintiffs, the trial court should have vacated the February 12, 1998, settlement agreement because it was clear that the condition precedent to the agreement could not be fulfilled. We review a trial court's decision to dismiss an action for an abuse of discretion. *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 359; 503 NW2d 915 (1993).

A review of the record reveals that the trial court's decision to dismiss plaintiffs' claim was based on its finding that plaintiffs had repeatedly failed to honor the terms of the February 12, 1998, settlement agreement. Whether plaintiffs failed to adhere to the terms of the agreement is essentially a factual determination. We defer to a trial court's factual findings and review them for clear error. *Cain v Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996); *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 8; 596 NW2d 620 (1999). "A finding is clearly erroneous when, although there is evidence to support it, this Court is left with the definite and firm impression that a mistake has been made." *Id.* at 9.

On February 12, 1998, the parties' entered into a settlement agreement on the record in open court. "[A]n agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts." *Michigan Mutual Ins Co v Indiana Ins Co*, ___ Mich App ___; ___ NW2d ____ (Docket No. 215570, issued 9/14/01), slip op, 3, quoting *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994); see also *Reed v Citizens Ins Co of America*, 198 Mich App 443, 447; 499 NW2d 22 (1993). A settlement agreement is binding where the parties articulate its terms on the record in open court. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349; 605 NW2d 360 (1999); MCR 2.507(H). Pursuant to general contract principles, a party is bound by a settlement agreement absent a showing of fraud, mistake, or unconscionable advantage. See *Plamondon v Plamondon*, 230 Mich App 54, 56; 583 NW2d 245 (1998); *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). Moreover, because

settlement agreements are favored in Michigan, our Courts are generally reluctant to set them aside. *Metropolitan Life Ins Co v Goolsby*, 165 Mich App 126, 128; 418 NW2d 700 (1987).

Once the parties enter into a settlement agreement, a change of heart by one party is insufficient to release a party from performance. *Reed, supra*; *Goolsby, supra*. Further, where a party's failure to comply with the terms of the settlement agreement leads to the failure of a condition, the party is not excused from liability. As this Court observed in *Stanton v Dachille*, 186 Mich App 247, 258; 463 NW2d 479 (1990):

> Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act; and, where he prevents, hinders, or renders impossible, the fulfillment of a condition precedent or its performance by the adverse party, or is himself the cause of failure to perform the condition, he cannot rely on such condition to defeat his liability. [*Id.*, quoting *Lee v Desenberg*, 2 Mich App 365, 369; 139 NW2d 916 (1966), in turn quoting 17A CJS, Contracts, § 468, p 645.]

On appeal, plaintiffs do not claim that the settlement agreement was the result of fraud, mistake, or unconscionable advantage, nor do plaintiffs contest that it is binding. Instead, plaintiffs simply assert that the settlement agreement should have been vacated because the condition precedent to the agreement was not satisfied.[1] The record is clear that plaintiffs were required to take certain steps to facilitate the fulfillment of the condition, and that they did not do so. Specifically, the settlement agreement required plaintiffs to submit a site plan consistent with the parties' agreement to defendant's expert for approval, before the plan was to be submitted to the governmental authorities for their approval. Because plaintiffs failed to do so, they may not now rely on the nonfulfillment of this condition to excuse their liability. *Stanton, supra* at 258.

That plaintiffs failed to comply with the terms of the settlement agreement is made clear by a review of the record. For example, defendant was forced to move to compel specific performance of the agreement in May 1998 after plaintiffs failed to submit a site plan to defendant's engineer for review. Although it appears from the record that plaintiffs did in fact submit a site plan to defendant's engineer following the trial court's June 1998 order compelling them to do so, the site plan submitted was not strictly in accordance with the settlement agreement as ordered by the trial court. For instance, plaintiffs acknowledged in their November 10, 1998, objections to defendant's proposed order of conditional dismissal that plaintiffs had "produced an alternative plan for resolution of the problems presented." Further, in a December 30, 1999, affidavit, defendant's engineer, who was present at the discussions leading to the February 1998 settlement agreement, averred:

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[1] The parties do not dispute that the approval of the site plan by the government agencies was a condition precedent to the settlement agreement. "A 'condition precedent' is a fact or event that the parties intend must take place before there is a right to performance. A condition precedent is distinguished from a promise in that it creates no duty or right in itself, but is merely a limiting or modifying factor." *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999), quoting *Reed v Citizens Ins Co of America*, 198 Mich App 443, 447; 499 NW2d 22 (1993).

> [S]ince the [settlement agreement] of February 12, 1998, to my knowledge, every plan submitted by [plaintiff Edwin Jakubs] and his various attorneys has sought to eliminate all or most of the natural flow of water from the Betten leased property to [plaintiffs'] property which was not what was agreed to at the [settlement agreement].
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> [Plaintiffs'] site plan prepared by [plaintiffs'] engineer is not consistent with the settlement reached by the parties. [(underline in original).]

On the basis of such evidence, the trial court found that the site plans submitted by plaintiffs were not congruent with the original settlement agreement. We defer to the trial court's factual determination. *Cain, supra* at 503. Additionally, although the record reveals that plaintiffs approached the MDOT and the health department shortly after the settlement agreement was reached, plaintiffs presented these agencies only with a copy of the transcript of the February 12, 1998, hearing as well as a rough sketch of the proposed plan, rather than a professional developed site plan by plaintiffs' engineer.

Likewise, to the extent that it appears from the record that the MDOT, the health department, and the township commission did not approve the parties' proposed agreement regarding the drainage ditch, the record evidence indicates that plaintiffs' dissatisfaction with the settlement agreement interfered with the agencies' approval. For example, Steven Serdel, a utilities-permit engineer with the MDOT, averred in an August 9, 1999, affidavit that "MDOT would not oppose the site plan [submitted by defendant's engineer] *but for* [plaintiff Edwin Jakubs'] objections." (emphasis added).

The record reveals that the trial court duly considered other available options before dismissing plaintiffs' claim. See *Vicencio v Jaime Ramirez MD, PC*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995). Specifically, the trial court took great pains to facilitate a settlement agreement between the parties, allowing them ample opportunity to reach an amicable agreement. Plaintiffs simply did not take advantage of these opportunities and obstinately refused to adhere to the terms of the February 1998 settlement agreement. The trial court also repeatedly noted that plaintiffs' failure to comply with the settlement agreement was wilful and deliberate, and that defendant was severely prejudiced by having to incur legal expenses for defending this action two years after a settlement agreement was reached. *Vicencio, supra* at 507. Although we recognize that dismissal is a "drastic step that should be taken cautiously," *id.* at 506, on this record we are confident that the trial court did not abuse its discretion in dismissing plaintiffs' claim.

II

Plaintiffs also maintain that the trial court abused its discretion in imposing sanctions. "[A] trial court has inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney." *Persichini v William Beaumont Hosp*, 238 Mich App 626, 639; 607 NW2d 100 (1999). We review a trial court's exercise of its inherent power for an abuse of discretion. *Id.* at 642; *Brenner v Kolk*, 226 Mich App 149, 160; 373 NW2d 65 (1997).

On this record, we are not persuaded that the trial court abused its discretion in imposing sanctions against plaintiffs. The record is clear that plaintiffs' persistence in trying to subvert the settlement agreement and alter its terms led to the imposition of the sanctions. For instance, the trial court first sanctioned plaintiffs in the amount of $600 in June 1998 after plaintiffs failed to take steps to prepare a site plan in accordance with the settlement agreement. The trial court later imposed an additional $1500 in sanctions in March 1999 because of plaintiff Edwin Jakubs' "absolute unwillingness" to comply with the terms of the settlement agreement. Finally, the trial court ordered an additional $1000 in sanctions in February 2000 to compensate defendant for attorney fees expended in defending against plaintiffs' repeated motions to reopen the case. According to the trial court, plaintiffs' motions were largely frivolous and unnecessary, given that they flowed from plaintiffs' refusal to adhere to the terms of the settlement agreement. Specifically, the trial court found that plaintiffs on numerous occasions attempted to challenge the terms of the settlement agreement under the guise of objecting to several proposed orders. The trial court's findings in this regard are amply supported by the record. Thus, we find no abuse of discretion in the trial court's imposition of sanctions.

Finally, plaintiffs assert that the trial court erred in not allowing plaintiffs to join other defendants in this action. Because plaintiffs fail to cite any authority in support of this argument, this issue is waived on appeal. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). Likewise, we reject plaintiffs' claim that the trial court erred in denying plaintiffs' motion for an evidentiary hearing. In their brief on appeal, plaintiffs present a largely incoherent argument without citation to meaningful authority to support their claim. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *In re Coe Trusts*, 233 Mich App 525, 537; 593 NW2d 190 (1999). We need not address issues given only cursory consideration. *Id.*[2]

Affirmed.

/s/ Hilda R. Gage
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

[2] To the extent that plaintiffs complain that the trial court was biased against them, we note that this independent issue is not properly preserved for our review because plaintiffs did not include it in their statement of questions presented in their brief on appeal. *Greathouse v Rhodes*, 242 Mich App 221, 240; 618 NW2d 106 (2000).